

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – March 05, 2015

IN THE MATTER OF sections 91, 92, 93, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3

-and-

IN THE MATTER OF appeals filed by Rob Tomlinson and Rolland Jackson with respect to Approval No. 00354088-00-00 issued under the *Water Act*, R.S.A. 2000, c. W-3, to the County of St. Paul by the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Sustainable Resource Development.

Cite as: *Tomlinson and Jackson v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Sustainable Resource Development, re: County of St. Paul* (05 March 2015), Appeal Nos. 14-021 and 12-022-D (A.E.A.B).

BEFORE:

Justice D.W. Perras (ret.), Board Chair.

SUBMISSIONS BY:

Appellants:

Mr. Rob Tomlinson and Mr. Rolland Jackson.

Approval Holder:

County of St. Paul, represented by Ms. Shauna Finlay, Reynolds Mirth Richards & Farmer LLP.

Director:

Mr. Mohammad Habib, Director, Red Deer-North Saskatchewan Region, Alberta Environment and Sustainable Resource Development, represented by Mr. Will Randall, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

On October 27, 2014, Alberta Environment and Sustainable Resource Development issued an Approval under the *Water Act* to the County of St. Paul for the infilling of wetlands to accommodate municipal road improvements. Mr. Rob Tomlinson and Mr. Rolland Jackson appealed the Approval on December 22, 2014, and January 21, 2015, respectively.

The appeals appear to have been filed past the 7-day deadline stipulated in the *Water Act*. The Environmental Appeals Board (the Board) asked Mr. Tomlinson and Mr. Jackson to provide their reasons for filing their appeals past the prescribed time limit and why the Board should extend the deadline.

Only in exceptional circumstances would the Board extend the time to file a Notice of Appeal. After reviewing their submissions and the submissions from AESRD and the County of St. Paul, the Board found there were exceptional reasons for extending the appeal period. The County of St. Paul had not posted notice of the decision to issue the Approval as required under the *Water Act* and as stipulated in the letter from AESRD to the County of St. Paul. Therefore, the appeal period had not ended at the time the appeals were filed, even though they were filed almost two to three months after the Approval was issued.

The Board accepted that Mr. Tomlinson and Mr. Jackson had filed their appeals in time since proper notice had not been provided.

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I. INTRODUCTION

[1] This is the Environmental Appeals Board's decision regarding the appeals filed by Mr. Rob Tomlinson and Mr. Rolland Jackson (the "Appellants").

[2] Alberta Environment and Sustainable Resource Development ("AESRD") issued an Approval under the *Water Act*, R.S.A. 2000, c. W-3, to the County of St. Paul (the "Approval Holder") on October 27, 2014, for the infilling of wetlands to accommodate road improvements.

[3] As the appeal for the approval appears to have been filed outside of the 7-day appeal period, the Environmental Appeals Board (the "Board") asked the Appellants to provide reasons why the Board should extend the appeal period. The Board asked the Approval Holder and AESRD to respond to the reasons provided by the Appellants.

[4] The Approval Holder did not post notice of the decision to issue the Approval as required under the *Water Act* and as stipulated in AESRD's letter to the Approval Holder. As such, the appeal period was open when both appeals were filed and, therefore, both appeals were filed in time.

II. BACKGROUND

[5] On August 27, 2014, the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Sustainable Resource Development (the "Director"), issued Approval No. 00354088-00-00 under the *Water Act* (the "Approval") to the Approval Holder to allow for the infilling of a wetland at NE 16, NW 15, E½ 21, W½ 22, E½ 27, W½ 33, E½ 34-58-10-W4M located in the in the County of St. Paul.

[6] On December 22, 2014, the Board received a Notice of Appeal from Mr. Rob Tomlinson appealing the Approval.

[7] On December 23, 2014, the Board acknowledged Mr. Tomlinson's appeal and notified the Approval Holder and Director of the appeal. In this letter the Board noted the Notice of Appeal appeared to have been filed after the 7-day appeal period for approvals issued under

the *Water Act*.¹ The Board asked Mr. Tomlinson to explain why the appeal was filed after the time limit and to provide reasons why an extension should be granted.

[8] Mr. Tomlinson provided his response on January 6, 2015, and responses from the Director and the Approval Holder were received on January 12 and 13, 2015, respectively. Final comments were received from Mr. Tomlinson on January 19, 2015.

[9] On January 21, 2015, the Board received a Notice of Appeal from Mr. Rolland Jackson. On January 26, 2015, the Board acknowledged Mr. Jackson's appeal and notified the Approval Holder and Director of the appeal. In this letter the Board noted the Notice of Appeal appeared to have been filed after the 7-day appeal period for approvals issued under the *Water Act*. The Board asked Mr. Jackson to explain why the appeal was filed after the time limit and to provide reasons why an extension should be granted. Mr. Jackson provided his response on January 26, 2015. On February 3, 2015, the Director provided his response, then on February 5, 2015 the Approval Holder provided its response. Mr. Jackson provided final comments on February 10, 2015.

III. SUBMISSIONS

A. Appellants

[10] Mr. Tomlinson stated he received notice of the decision on December 17, 2014, by email after he discovered that a Notice of Decision was issued to the Approval Holder with respect to filling in the wetlands.

¹ Section 116(1) of the *Water Act* provides:

“A notice of appeal must be submitted to the Environmental Appeals Board

- (a) not later than 7 days after...
 - (ii) in the case of an approval, receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from,
- or
- (b) in any other case, not later than 30 days after receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from.”

[11] Mr. Tomlinson said he filed his Notice of Appeal within seven days of receiving the notice of the decision.

[12] Mr. Tomlinson argued it would be unreasonable to reject his appeal based on the date the Approval was issued and not the date the Approval was provided to him.

[13] Mr. Tomlinson noted the Approval Holder was advised on November 6, 2014, that the Notice of Decision should be posted on the county bulletin board for seven days. Mr. Tomlinson argued it is unreasonable for the public to visit the county office on a weekly basis to view the bulletin board to ensure they meet the required seven days to file an appeal. Mr. Tomlinson said it would be unreasonable to consider posting on the county bulletin board adequate notice, if notice had been posted.

[14] Mr. Tomlinson stated Ms. Tomlinson viewed the county bulletin board on November 10, 2014, and the Notice of Decision to fill in the wetlands along Range Road 103 was not posted.

[15] Mr. Tomlinson said the Approval Holder did not do its due diligence since the notice was not published in the local newspaper. He argued it is unreasonable to expect the general public to do their own investigations to determine whether government approvals have been issued.

[16] Mr. Tomlinson said he is aware of only two county residents who were aware of the Notice of Decision to fill in the wetlands and that the decision could be appealed.

[17] Mr. Tomlinson stated he is not asking the Board to extend the deadline to file his appeal because the Notice of Decision has not been posted. Mr. Tomlinson said that, under the *Water Act*, notification of a decision must be posted, and the Approval Holder has failed to comply with the *Water Act*.

[18] Mr. Jackson argued an extension should be granted because no notice was:

1. provided to the aboriginals adjacent to the County;
 2. posted at the band office in Saddle Lake;
 3. posted in the area newspaper;
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4. posted in any aboriginal newspapers;
5. posted on any of the bulletin boards throughout the Saddle Lake Reserve;
nor
6. provided to Band Council.

[19] Mr. Jackson argued it would be unreasonable to expect anyone to file their Notice of Appeal on time without proper notice.

[20] Mr. Jackson explained he received information on the Approval the week of January 11, 2015, from a neighbour who received an email instructing the Approval Holder post the Notice of Approval on its bulletin board. Mr. Jackson stated this is not the appropriate place for aboriginals to view any public notice, if the Approval Holder had posted the notice.

[21] Mr. Jackson said the Saddle Lake Indian Reserve is adjacent to the County and down gradient from the project at issue. He said it is unreasonable that members of the Saddle Lake Indian Reserve are not provided notice of projects that directly affect them.

[22] In response to the Approval Holder's submission, Mr. Jackson noted the Notice of Approval was not waived, and the Director set the terms and conditions to the notice process.

[23] Mr. Jackson noted the Saddle Lake #125 Band is an adjacent land owner to the project and are not distant neighbours.

B. Approval Holder

[24] With respect to Mr. Tomlinson's Notice of Appeal, the Approval Holder stated it had no issue with the Board extending the appeal period for Mr. Tomlinson to January 20, 2015.

[25] The Approval Holder noted the Approval was issued on October 27, 2014, and on the same date, the Director waived the notice requirement for the Approval.

[26] The Approval Holder noted the Approval was posted on the AESRD Approval viewer on November 6, 2014, and was available for public viewing on November 7, 2014.

[27] The Approval Holder stated it received the Approval on November 6, 2014, and in the covering letter, it was directed to post public notice of the Approval in the County of St. Paul office. The Approval Holder said that, due to an oversight, the notice was not posted.

[28] The Approval Holder indicated machinery was onsite and work was ongoing at sites identified in the Approval during October and November 2014. The Approval Holder explained the work site is approximately 24 kilometres from the sites of concern identified by Mr. Jackson, specifically the Saddle Lake Reserve, Saddle Lake, and Pakan Lake.

[29] The Approval Holder noted Mr. Jackson received notice of the issuance of the Approval during the week of January 11, 2015.

[30] The Approval Holder acknowledged it failed to post the public notice, but Mr. Jackson did not identify any extenuating circumstances that justify an extension of the appeal period.

[31] The Approval Holder stated that no specific notice was required to be given to any person, including Mr. Jackson, and the Approval decision was publicly available on the internet.

[32] The Approval Holder said that even though notice was not posted in its office, other persons in the community had actual notice of the decision to issue the Approval. The Approval Holder referred to Mr. Tomlinson's appeal filed in December 2014 and that Mr. Jackson's neighbour advised him of the Approval.

[33] The Approval Holder argued that if Mr. Jackson was advised of the issuance of the Approval on January 10 or 11 or earlier that week, his appeal is out of time.

[34] The Approval Holder noted Mr. Jackson's appeal was filed almost three months after the Approval was issued. The Approval Holder said Mr. Jackson's major complaint was that multiple means should have been used to provide notice of the Approval to the Saddle Lake Band, but the Director did not require the Approval Holder to provide such notice and none of the Saddle Lake Band or the Appellants have been identified as directly affected parties.

[35] The Approval Holder noted the Director's decision regarding notice and notice requirements as set out in the *Water Act* and regulations are not appealable and, therefore, criticism of such decisions and the legislation should not be used as a justification to extend an appeal period.

[36] The Approval Holder submitted that circumstances do not exist to justify extending the appeal period, and granting an extension would introduce uncertainty into the approval process. The Approval Holder argued that in circumstances where notice requirements had been waived, approval holders would have to guess as to when neighbours might have actual notice of the approval. The Approval Holder said the possibility of an appeal of an approval at some later date would be difficult to avoid if information was passed on months after the approval was granted.

C. Director

[37] The Director explained he waived notice of application under section 108(6)(b) of the *Water Act* on the basis the Approval Holder's application would result in minimal or no adverse effect on the aquatic environment or other users. The Director stated he required the Approval Holder to post notice of the decision on a County bulletin board for seven days. The Director understood the Approval Holder never posted the notice of the Approval in accordance with the instructions in the Approval letter. The Director stated that, based on this information, the appeal period has not closed in this matter.

[38] The Director took no position on the timeliness of Mr. Jackson's Notice of Appeal.

IV. ANALYSIS

[39] At this point in the appeal process, the Board is determining whether the Appellants filed their Notices of Appeal within the legislated timeframe or if there are exceptional circumstances that warrant extending the appeal period.

[40] Section 116 of the *Water Act* sets the time lines for filing a Notice of Appeal.² The appeal period for an approval issued under the *Water Act* is seven days. The appeal period

² Section 116(1) of the *Water Act* states:

“A notice of appeal must be submitted to the Environmental Appeals Board

(a) not later than 7 days after...

starts when a person is in receipt of the notice of decision or the last provision of notice of the decision, whichever is later.

[41] Section 116(2) of the *Water Act* allows the Board to extend the appeal period if there are sufficient grounds to do so.³ The Board generally does not extend the appeal period unless there are extenuating circumstances to do so. There must be a degree of certainty in the appeal process to be fair to all parties involved.

[42] In this case, the Director waived notice of the application for the Approval, which he has the ability to do under section 108(6)(b) of the *Water Act*.⁴ However, if he waived notice of the application, he cannot waive notice of the decision to issue the Approval. Since there was no notice of the application in this case, notice of the decision was required. The legislation requires that notice of the decision to issue the Approval be completed in the manner specified by the Director.⁵

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- (ii) in the case of an approval, receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from....”

³ Section 116(2) of the *Water Act* states:

“The Environmental Appeals Board may, on application made before or after the expiry of the period referred to in subsection (1), extend that period, if the Board is of the opinion that there are sufficient grounds to do so.”

⁴ Section 108(6)(b) of the *Water Act* provides:

“Notwithstanding subsection (1), if the Director has received an application for an approval, a licence or an amendment of an approval, preliminary certificate or licence or the Director proposes to make an amendment on the Director’s own initiative, the Director may waive the notice requirement under subsection (1) if the Director is of the opinion that...

- (b) the activity or diversion of water specified in the application for the approval or licence or the proposed amendment will result in a minimal or no adverse effect on the aquatic environment or on household users, licensees and traditional agriculture users....”

⁵ Section 111 of the *Water Act* provides:

“If the Director

- (a) issues an approval...

the Director must comply with the notice requirements referred to in subsection (2).

(2) If subsection (1) applies, the Director must

- (a) if notice of the application or proposed changes was waived by the Director under section 108(6), ensure that notice of the decision is provided, in accordance with the regulations, to any directly affected person...”

[43] Under the *Water (Ministerial) Regulations*, Alta. Reg. 205/1998, the Director can specify the way notice of the decision is to be provided.⁶ Even though the decision was posted onto the AESRD approval viewer, the Director also required the Approval Holder post the notice of decision on the public bulletin board. The Approval Holder acknowledged the notice of the decision was not posted.

[44] The appeal period starts when notice of the decision is posted. If the notice has not been posted yet, then the appeal period has not started. When there is no notice of the application, it is even more important that notice of the decision is given as required. The amount of notice required in this case was not onerous.

[45] Hearing that a decision to issue the Approval has been made or seeing work being done at the site does not constitute notice under the legislation. The Board notes the Approval Holder said there was equipment at the site in October and November 2014, but the Approval was not issued until October 27, 2014. This tends to suggest that work may have been done at

⁶ Section 13(1) of the *Water (Ministerial) Regulation* states:

“For the purpose of providing notice under sections 34(3), 108, 110(4) and 111 of the Act, the Director must do, or must require an applicant to do, one or more of the following:

- (a) publish notice of the application, decision or order in one or more issues of a newspaper that has daily or weekly circulation in the area of the Province in which the activity, diversion of water or operation of a works that is the subject of the application, decision or order is or will be carried out;
- (b) provide notice of the application, decision or order through a registry established by the Government for that purpose;
- (c) provide notice of the application, decision or order through a telecommunication system or electronic medium;
- (d) publish notice of the application, decision or order in *The Alberta Gazette*;
- (e) make available a copy of the application, decision or order in one or more branch offices of the Department in the area of the Province in which the activity, diversion of water or operation of a works that is the subject of the application, decision or order is or will be carried out;
- (f) provide notice of the application, decision or order, in the form and manner and within the time period specified by the Director, to
 - (i) any persons determined by the Director, and
 - (ii) the local authority of the municipality in which the land on which the activity, diversion of water or operation of a works is located;

the site prior to the Approval being issued. The Director may want to investigate this further or have compliance investigate if the work was completed prior to the Approval being issued.

[46] The Approval Holder argued that granting an extension would bring uncertainty into the approval process, and that in circumstances where notice requirements were waived, approval holders would have to guess when the actual notice of the approval is given. Notice of the application was waived in this case, not notice of the decision. It is the posting of the notice of decision that starts the appeal period, and the Approval Holder had control over when the notice was posted. There is no uncertainty in that process. Uncertainty was brought into the process in this case because the Approval Holder did not abide by the requirements set out by the Director. The Board understands the Notice of Decision has still not been posted on the County's bulletin board. If this is the case, then it may be that the appeal period remains open for other persons who wish to appeal. If the Approval Holder is truly concerned about the potential uncertainty related to this project, they may wish to remedy this deficiency.

[47] The Appellants argued the amount of notice of the decision was insufficient. There is no appeal right of the Director's decision to limit the notice requirements to a posting on the County bulletin board. Although the Board encourages reasonable notice, the Regulation requires, at a minimum, only one of the listed methods. In this case, the Director required two methods of notice: (1) the Director posted it on the AESRD Approval viewer; and (2) the Approval Holder was required to post it on the bulletin board. According to the legislation, this meets the notice requirements.

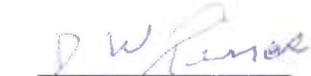
[48] Given that proper notice of the decision was not provided to the public, the Board accepts the Notices of Appeal have been filed in time.

(g) provide notice in any other form and manner considered appropriate by the Director.”

V. DECISION

[49] The Board accepts the Notices of Appeal filed by the Appellants as having been filed in time.

Dated on March 5, 2015, at Edmonton, Alberta



D.W. Perras
Board Chair